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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AMERICAN NEWS COMPANY AND
THE UNION NEWS COMPANY,
corporations,

Petitioners,

against

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, American News Company and The Union News Company, petition for a writ of certiorari to review the final decree of the United States Court of Appeals for the Second Circuit, one judge dissenting, which modified and affirmed an order to cease and desist issued by the Federal Trade Commission.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (Appendix *infra*, pp. 19-37) are reported at 300 F. 2d 104. The opinion of the Federal Trade Com-

mission (Petitioners' Appendix in the Court of Appeals pp. 41a-54a) is not officially reported. It is unofficially reported in the Trade Regulation Reporter, 1960-1961 Transfer Binder, at ¶29,335. The initial decision of the hearing examiner (Petitioners' Appendix in the Court of Appeals pp. 22a-40a) is not reported.

Jurisdiction

The final decree of the Court of Appeals was entered on April 27, 1962. The jurisdiction of this Court is invoked under 15 U.S.C., §45(c) and 28 U.S.C., §1254.

Questions Presented

1. Mindful that Section 2(d) of the Clayton Act* makes unlawful only *payments by vendors* to their customers for services or facilities unless made available on proportionally equal terms to competing customers, and Section 2(f) of the Clayton Act condemns only the inducement or receipt of a discrimination *in price;* was the omission from these Sections of any reference to or condemnation of the *receipt* by customers of considerations for services or facilities furnished a vendor a legislative oversight or a deliberate expression of Congressional intent to refrain from imposing on customers the oppressive and unachievable task of identifying and appraising the infinite and diverse variety of considerations, services and facilities and their value, which may be involved in determining proportional equality.

2. Whether a long established trade practice, never previously criticized or challenged as unlawful, immoral or

* Section 2(d) of the Clayton Act, as amended by the Robinson Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §13(d) (1958).

otherwise improper, may be condemned on a *per se* basis as a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C., §45).

3. Whether the petitioners' refusal to deal in magazines of publishers who unlawfully fixed petitioners' cost and selling prices unless an adjustment was made in the cost to petitioners constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act, particularly where the publishers compete with petitioners in the sale of such magazines to the general public, and the unlawfully fixed cost and selling prices involve petitioners in financial loss.

4. Whether a "customer-seller" relationship which does not exist in fact may be imputed to the petitioners on the basis of illegal price fixing by publishers, particularly in circumstances where the unlawful price fixing was resisted by the petitioners upon whom the customer relationship has been imposed.

5. Whether, as a matter of law, there is evidence to sustain the holding that petitioners knew or should have known that the payments granted to them were discriminatorily disproportional.

6. Whether petitioners' purchases of magazines from local intrastate wholesalers and their sales of such magazines intrastate from their local newsstands are in interstate commerce.

7. Whether the decree of the Court of Appeals is overreaching, oppressive, ambiguous and improper.

Statutes Involved

Clayton Act, Section 2, as amended by the Robinson-Patman Act, 19 Stat. 1526 (1936), 15 U.S.C., §13 (1958):

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities . . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

. . . . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. . . .

. . . . . .

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the

payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * * *

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by this section."

Federal Trade Commission Act, Section 5, 52 Stat. 111 (1938), as amended, 66 Stat. 632, 15 U.S.C., §45 (1958):

"Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Sherman Act, Section 1, 26 Stat. 209 (1890), as amended; 15 U.S.C., §1 (1955):

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, . . ."

Statement

The pertinent facts involved in this proceeding are not in dispute. Although the complaint contained allegations

ambitiously encompassing numerous products and a variety of industries, the hearings developed that the only product involved in this proceeding is periodicals, consisting of magazines, comic books and pocketbooks (collectively referred to herein as "magazines"). The only industry involved is the distribution and sale of magazines to the general public.

Distribution of Magazines.

There are two main channels of distribution in the magazine industry. Magazines reach the ultimate consumer either directly from the publisher by subscription sales, or through sales by independent local newsstands or other retail establishments performing the newsstand function (collectively referred to herein as "newsstands").

Publishers, through their subscription sales, are in direct competition with newsstands for the custom of the reading public.

There are over 100,000 newsstands in the United States, of which 930, or less than 1%, are operated by petitioner, Union News Company (Union). Notwithstanding this miniscule quantum of control, the Federal Trade Commission and the Court of Appeals below reached the unprecedented conclusion that petitioners dominated the newsstand industry of the United States. This conclusion appears to be based solely on the fact that Union is the largest operator of newsstands in this country. No consideration was given to the additional fact that in the approximately 100 years of petitioners' existence, they have acquired control of only a trifling portion of the industry.

Publishers' sales to the public, via the subscription medium, follow a direct route from the publisher to the reader. Newsstand sales, on the other hand, travel a more

indirect road. Publishers sell their magazines to national distributors although, in certain instances without significance in this proceeding, a few publishers act as their own national distributors and in one instance a group of publishers have cooperatively formed a national distributing company which handles the distribution of their magazines as well as the magazines of independent publishers. National distributors, in turn, resell the magazines to local independent wholesalers located in the various states. These wholesalers, in turn, resell the magazines locally to retail newsstands. The local newsstands sell to the public. Union purchases its magazine supplies from local wholesalers located in the same state as each respective Union newsstand.

Illegal price fixing in the newsstand distribution of magazines and the effects thereof.

Publishers uniformly enter into agreements with their respective national distributors, specifying and fixing the prices which the national distributor shall exact from the wholesaler, which the wholesaler shall, in turn, exact from the retailer and which the retailer shall charge the general public. National distributors, on their part, enter into agreements with their respective wholesalers fixing the prices which the wholesalers shall charge the retailers and which the retailers are to charge the public. These prices are identical with the prices specified in the publisher-distributor agreements. These agreements are not protected by any state fair trade price law nor do they involve exculpatory agency or *del credere* agency relationships. They are obvious, *per se* price-fixing violations of Section 1 of the Sherman Act, which have been condemned by this Court in an unbroken line of decisions from *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373 (1911) to *U. S.* v. *Parke Davis Company*, 362 U. S. 29 (1959).

Newsstand dealers are not parties to any of these price fixing agreements. On the contrary, they are the objectives of this illegal activity.

Publishers and their respective national distributors have supported and sustained their unlawful price fixing agreements by various adjuvant agreements and conspiratorial activities. Wholesalers are allocated territories within which each is the newsstands' sole source of supply. Newsstands must buy and sell at the unlawfully fixed cost and selling prices under penalty of being cut off from their sole source of supply. National distributors maintain substantial forces of field men whose duties include policing the price fixing and other provisions of the restrictive agreements. Wholesalers who deviate from the unlawfully fixed prices are ordered to desist and in some instances have been required to make repayments to retailers. Wholesalers who extend their operations beyond their allocated territories are required to withdraw and to confine their activities to their allocated territories. To assist in maintaining the unlawfully fixed prices to be charged the ultimate consumer, publishers imprint a cover price upon their respective magazines and this feature, together with the other restrictive agreements and practices, has effectively compelled adherence by retailers to the illegally fixed consumer price.

While retail newsstands have been compelled to adhere to the artificially fixed prices to the public, publishers, in competition with these retailers, have offered their magazines to the public at substantially lower prices. Indeed, to induce the public to purchase magazines from the publishers rather than from newsstands, publishers in their advertising have emphasized, as a cost saving, the differential between the prices which they were quoting readers

and the higher prices which they compelled retail newsstands to charge.

The economic evidence submitted by the petitioners and accepted by the Commission indisputably established that domination and control of the retail sale of magazines is progressively passing into the hands of the publishers. Indeed, the Commission and the Court of Appeals below found that the newsstand industry is a waning industry. This is the inevitable consequence of the long existing illegal restraints imposed by the publishers upon the newsstand industry.

Alleged Misconduct of Petitioners.

The unlawfully fixed cost and selling prices were resisted by petitioners and other chain newsstand operators, and with good reason. While the spread between these cost and selling prices was uniformly fixed by the publishers at 20% of the selling price, the breakeven cost of chain newsstand operators in handling magazines amounted to between 27% and 28% of that price. The imposed 20% spread involved these operators in a loss on each magazine sold.

In the circumstances, petitioners and other newsstand operators refused to deal in magazines at the unlawfully fixed cost and selling prices. Publishers, on the other hand, were unwilling to relax their control over prices. Confronted with this dilemma, publishers, for more than thirty years, have made it a practice to grant secret rebates or allowances to chain newsstands. These allowances have taken a variety of forms. Union and similar chain newsstand operators have been granted a rebate for each copy of the magazine sold. The A & P grocery chain was paid a flat sum of $2.00 per week per store for alleged rack rental space without regard to

the number of copies sold. United Whelan Corporation, a drug chain, received an allowance of $12,000.00 a year from one publisher, $18,000.00 a year from another publisher and $1,500.00 a month from a third publisher, all without regard to whether or not any copies of the publication were sold.

The allowances granted to particular retailers were at all times closely guarded secrets of the publishers. Misstatement, falsehood and outright fraud were resorted to by the publishers and their national distributors to preserve this secrecy. Inquiry was patently futile. It was only at the Federal Trade Commission hearings that petitioners learned, for the first time, the amounts and the nature of the allowances granted by publishers to other retailers, and even then the proportional relationship among these diverse payments defied determination.

The Commission attributed culpability to petitioners by a series of novel holdings: first, because a seller-customer relationship is essential to a finding of liability under Section 2(d) of the Robinson Patman Act, the Commission held that the successful imposition of illegal cost and selling prices by the publishers upon the petitioners, in turn, imposed a seller-customer relationship upon the petitioners with respect to the publishers; second, that petitioners' refusal to deal in the magazines of the publishers at the ruinous illegally fixed prices constituted a coercive act by the petitioners to induce the payment of discriminatory allowances; third, that the receipt of payments by petitioners constituted a *per se* violation of Section 5 of the Federal Trade Commission Act; and, fourth, that the unlawful price fixing, the losses inherent in these unlawful prices, the injury to the newsstand industry resulting therefrom, and all other exculpatory evidence were irrelevant in view of the holding that the petitioners'

conduct was a *per se* violation of the Federal Trade Commission Act.

An injunctive decree has been issued in this proceeding which not only incorporates the broad language of Sections 2(d) and 2(f) of the Clayton Act, but imposes upon petitioners obligations not included in these sections. For example, petitioners are under an undefined and unlimited obligation to make affirmative inquiry in an industry where, historically, inquiry has met with fraud, falsehood and misstatements. The injunction, additionally, is made applicable to every activity of petitioners, although the only commerce involved in this proceeding is the newsstand distribution of magazines, and despite the fact that malpractices exist in this industry which set it apart from all other fields of commercial activity.

Reasons for Granting the Writ

The decision of the Court of Appeals below announces a number of novel legal principles having a profound impact on the commerce of the United States, which should be reviewed by this Court. In addition, the decision of the court below contains features which are in conflict with or in unreasonable extension of prior decisions of this Court.

1. In §2a of the Clayton Act, as amended by the Robinson Patman Act, 15 U.S.C., §2(a), the Congress expressed the policy of the United States with respect to the granting of price discriminations which have or may have a harmful effect upon competition. In section 2(f) of this same Act, the Congress applied this policy to the receipt of such price discriminations by declaring unlawful the knowing inducement and receipt thereof where an adverse com-

petitive effect may be involved. In other subdivisions of the Clayton Act (§§ 2c, 2d and 2e), the Congress enumerated specific conduct which it declared unlawful without regard to whether any harmful effect upon competition may be involved (*F.T.C.* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 55 (1959)). Specifically, in Section 2(d) of the Clayton Act, the *payment* to a customer of anything of value as compensation for services or facilities is declared unlawful, unless such payment is made available on proportionally equal terms to all other customers competing in the distribution of the products or commodities involved. It is significant that Congress, in Section 2(d), condemned only *payment* and omitted any reference to *receipt*. Of equal significance is the fact that Congress also omitted from Section 2(f) of the Act any reference to the *receipt* of the compensatory payments condemned by Section 2(d). The court below has held that these omissions were the result of legislative oversight and that the receipt of such compensatory payments was intended to be included and was *per se* unlawful without regard to the absence of competitive effect or the presence of exculpating circumstances.

It is the position of petitioners that the Congressional forebearance from including the receipt of compensatory payments in the sanctions of Sections 2(d) and 2(f) of the Clayton Act was intentional, with the deliberate purpose of refraining from imposing an intolerable and oppressive burden on customers receiving compensatory payments for services or facilities.

Availability and proportional equality have been construed as requiring the availability of equivalents. That is to say, where a payment is made to a customer for a service or facility which a competing customer is unable

to furnish, the seller is required to make available to such competing customer, on a proportionally equal basis, payments for services or facilities which such competitor is in a position to supply. It is self-evident that this doctrine of equivalents can involve an infinite variety of unidentified services and facilities, each involving a separate question of proportional equality. The existence of proportional equality includes questions of the identity of the services or facilities furnished by each competitor, the value to the seller of each of these diverse services or facilities, the cost of each to the supplying competitor, the precise amount paid by the seller to each competitor for each service or facility, and the comparative values of the services or facilities furnished by the customer and those furnished by each competitor. In addition, the customer is obliged to ascertain whether each of his competitors is in a position to furnish the services or facilities for which the seller is offering payment. A determination of these difficult questions requires a knowledge on the part of a customer of the business of his competitors which he does not have and which he could not possibly acquire without running afoul of other antitrust laws. This problem was identified and expressed by this Court in far less onerous circumstances in *Automatic Canteen Co.* v. *F.T.C.* 346 U. S. 61 (1952). There only price identity was involved, a fact which required neither the special knowledge nor expertise essential to the determination of proportional equality.

In the circumstances, it seems clearly erroneous to assume that the Congress was silent out of inadvertence rather than because of due regard to the onerous burdens which speaking would impose on American business.

The Court of Appeals below, in effect, has added a new *per se* violation to the Clayton Act which the Congress

omitted from that Act. This unprecedented holding merits review by this Court. Judicial legislation of this type has been repeatedly criticised by this Court. *Osaka Shosen Kaisha Line* v. *U. S.*, 300 U. S. 98 (1937); *U. S.* v. *American Trucking Association*, 310 U. S. 534 (1940); 68 *Cases of Jam* v. *U. S.*, 340 U. S. 593 (1951).

2. The payments involved in this proceeding have been identified as payments for sales promotional services or facilities. The origin of the practice of receiving these payments seems lost in antiquity. Government witnesses whose recollection extended back for more than thirty years could not recall when these payments had originated, or had not been received by newsstand operators, including petitioners. Until the present proceeding, the receipt of these payments had never been condemned, challenged, criticized or questioned by any tribunal, judicial or administrative. Plainly, no question of immorality is involved in the receipt by a customer of a payment, discriminatory or not, for services or facilities furnished to a seller. Despite this long, unbroken history of judicial and administrative acquiescence and acceptance, and despite the fact that Congress, with full opportunity, refrained from proscribing this business practice, the Commission and the Court of Appeals below have not only declared the practice unlawful, but have condemned it as a *per se* violation of Section 5 of the Federal Trade Commission Act. Never before in the history of that Act or of any other antitrust statute has an accepted business practice, without taint of immorality been condemned on first impression as a *per se* violation of law. The decision of the court below is in conflict with rules of law expressed by this Court in *F.T.C.* v. *Gratz*, 253 U. S. 421 (1920) and in conflict with the principle con-

firmed by this Court in *F.T.C.* v. *R. F. Keppel & Bro.*, 291 U. S. 304 (1934), that whether competition is unfair or not depends on the circumstances of the particular case, as what is harmful under certain circumstances may be beneficial under different circumstances. It is urged that the propriety of condemning on a *per se* basis conduct which has never previously been challenged and which contains no infirmity of immorality should be reviewed by this Court.

3. In the industry involved in this proceeding petitioners, as well as all other newsstand operators, were victimized and exposed to loss by the illegal fixing of their cost and selling prices. Petitioners resisted this unlawful activity by refusing to deal in the magazines of the price-fixing publishers unless an adjustment was made in these unlawfully fixed prices. Adjustment took the form of a grant of a promotional allowance to petitioners on a per copy basis for each magazine sold. The court below held that petitioners' refusal to deal at the illegally imposed fixed prices constituted a coercive inducement for the allowances paid by the publishers and that the receipt thereof by petitioners constituted an unfair method of competition. The facts bring into precise focus the novel question of whether the acceptance of a price adjustment in circumstances where the recipient is the victim of a price-fixing conspiracy and has refused to deal in the price-fixed product unless he is granted an adjustment in price constitutes a violation of law. Whether the adjustment is direct by a reduction in price or indirect by the grant of an allowance is immaterial to the issue. Under the theory of the court below, a direct reduction in price would have been just as illegal as a promotional allowance. It is submitted that resist-

ance to illegal price-fixing is not a restriction on competition but a benefit to it. For example, petitioners' successful resistance to the unlawful price fixing of the publishers imposed legal obligations on the publishers to grant similar considerations to all of petitioners' competitors—and the publishers' failure to fulfill this obligation has evoked cease and desist orders against them. The fundamental question of the extent of the right of a victim of a price-fixing conspiracy to resist this unlawful activity should be defined by this Court. Under the decision of the Court of Appeals below, the only realistic alternatives available to petitioners are to submit to the illegal prices or withdraw from the magazine industry. Both alternatives are intolerable.

4. Magazines pass from the publisher through three levels of distribution in reaching the petitioners. The publisher sells to a national distributor; the national distributor sells to an independent local wholesaler; and the wholesaler sells to the Union newsstand located in his local area. The Court of Appeals below has held that despite this wide separation between publisher and petitioners, the latter are customers of the publisher. To reach this conclusion the Commission and the Court of Appeals below expressed the startling proposition that the illegal price-fixing of the *publishers* could constitute a basis for imposing an artificial customer-seller relationship upon *petitioners* for the purpose of inflicting injunctions, sanctions and penalties upon them. This resort to the misconduct of an aggressor to impose an artificial relationship upon his victim is so unrealistic, inequitable and unjust as to call for consideration by this Court. The importance of the question is emphasized by the Commission's concession that unless the seller-customer relationship exists, the case against the petitioners must fall.

5. The nature and amounts of the allowances granted by publishers to newsstand operators were closely guarded secrets of the publishers and their national distributors. Both repeatedly resorted to fraud and falsehood to preserve that secrecy. The evidence clearly demonstrated that lying and cheating were a common practice. Inquiry was regularly countered with falsehood. Despite this demonstration, the Court of Appeals below held, in effect, that petitioners were bound at their peril to accept the unsupported assertions of these proved frauds who were speaking solely in their own interest and for their own unlawful purposes. The attribution of knowledge to the petitioners in the circumstances here involved is unsupported by evidence and is a grave injustice which should be reviewed by this Court.

The practical impossibility of determining proportional equality has already been discussed and will not be repeated, except to recall that allowances took a variety of unrelated forms, including payments on a per copy sold basis, payments on a rack rental basis, and cash payments without regard to the number of copies sold.

6. This Court, in *Bunte Bros.* v. *F.T.C.*, 312 U .S. 349 (1941), defined the limits of the jurisdiction of the Federal Trade Commission over interstate commerce. The present proceeding represents an unwarranted extension of those limits. Here, the court below has extended the Commission's authority to include the purely local, intrastate purchase and sale of magazines. The basis for this enlargement of authority appears to be principally that Union's operation of a multiple of local newsstands rendered each, despite its local character, subject to Federal Trade Commission jurisdiction. This presents a novel question of the scope of Federal Trade Commission jurisdiction over interstate commerce, which should be reviewed by this Court.

Petitioners' position is not urged with respect to its newsstands located in the District of Columbia, but these constitute an insignificant portion of petitioners' newsstand operations.

7. Contrary to the instruction of this Court in *F.T.C. v. Henry Brock*, 82 S. Ct. 431 (1961), the injunctive decree in this proceeding is written in the broad language of Sections 2(d) and 2(f) of the Clayton Act (15 U.S.C., §13) and imposes indefinite and ambiguous responsibilities upon petitioners to a degree which must oblige them to forego all promotional and similar payments for services or facilities furnished, or risk charges of contempt and exposure to heavy penalties. This is no idle concern of petitioners. Publishers subject to restraining orders issued by the Federal Trade Commission under Section 2(d) of the Clayton Act are presently being sued for heavy penalties on charges that promotional allowance programs adopted by them in attempted compliance with Section 2(d) and apparently in conformity therewith are discriminatory. Petitioners who cannot have available the facts in the possession of the publishers and are unqualified to appraise equivalent availability or proportional equality are, indeed in grave danger of prosecution under the sweeping and ambiguous decree herein.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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LESTER LEWIS JAY,
Attorneys for Petitioners.

July, 1962.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—September Term, 1961.

(Argued October 10, 1961 Decided February 7, 1962.)

Docket No. 26857

AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before—CLARK, WATERMAN and MOORE, Circuit Judges.

Petition to review an order of the Federal Trade Commission.

American News Company and The Union News Company petition to review an order of the Federal Trade Commission directing them to cease and desist from inducing, receiving, or contracting to receive any payments for sales services which Union's suppliers were forbidden by §2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C., §13(d), to make. Modified and affirmed.

LESTER LEWIS JAY and EUGENE FREDERICK ROTH, New York City, for petitioners.

MILES J. BROWN, Atty., Federal Trade Commission, Washington, D. C. (James McI. Henderson, Gen. Counsel, and J. B. Truly, Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C., on the brief), for respondent.

CLARK, Circuit Judge:

This case, like *Grand Union Co.* v. *F. T. C.*, 2 Cir., 300 F. 2d 92, also decided today, presents the question whether a buyer who knowingly induces and receives from his supplier disproportionate promotional allowances which §2(d) of the Clayton Act. as amended by the Robinson-Patman Act, 15 U.S.C., §13(d), forbids the supplier to make, thereby engages in unfair methods of competition in violation of §5 of the Federal Trade Commission Act, 15 U.S.C., §45. Many of the issues raised by this appeal were decided in *Grand Union, supra.* Petitioners make several contentions here, however, which were not presented in that case.

Petitioner Union News Company is wholly owned and controlled by petitioner American News Company. Union is the nation's largest retail newsstand operator, with stands in many important transportation terminals, hotels, and office buildings. The Commission found that it is in a position of near dominance in the field. In 1958, it operated 930 newsstands, while the next largest firm in

the field operated 57 stands.[1] While Union's stands sell candy, cigars, cigarettes, and other items in addition to newspapers and magazines, these proceedings are primarily concerned with practices in connection with sales of certain publications, including magazines, comic books, and pocket books.[2]

There are two main channels of distribution in the national periodical industry. Magazines reach the ultimate consumer either directly from the publisher by subscription or by newsstand sales through a chain of distributors, wholesalers, and retailers. Those copies which are distributed through the latter route go from the publisher to national distributors, who redistribute to wholesalers, who in turn distribute to retailers such as Union. These arrangements are usually exclusive; each publisher uses only one national distributor, in some cases a subsidiary of the publisher itself, and the distributor in turn grants its several wholesalers exclusive territorial rights.[3] The Federal Trade Commission found that in every instance the national publisher controls the prices and terms of sale throughout the distribution process, so that neither

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1. In 1958, the five principal retail newsstand operators were:

Union News Co.	930	newsstands
ABC Vending Corp.	57	"
Faber, Inc.	35	"
Commuter News Co., Inc.	16	"
Schermerhorn Cigar Stores, Inc.	16	"

2. The complaint charged a violation of §5 in connection with the sale of cigars, as well as periodicals and pocket books. The Commission found, however, that the evidence did not support this allegation, and limited its findings to the publications area.

3. While this is the general pattern, it is not uniformly adhered to. Thus some publishers, such as Popular Publications, Inc., distribute directly to wholesalers.

the national distributor nor the wholesaler has any power to set prices, terms, or conditions of sale to retailers of the magazines. Moreover, since each publication bears a cover price chosen by the publisher, the publisher effectively sets the retail price as well. Reflecting these economic realities Union's negotiations for price adjustment—the subject of these proceedings—were carried on with the publisher or with a national distributor on behalf of the publisher, rather than with the wholesaler from whom Union actually received the magazines.

Petitioners do not deny that they induced and received substantial special payments from publishers; in 1958 these payments amounted to $890,000, an amount equal to almost 17 per cent of Union's total sales of magazines.[4] During the period under review petitioners approached various publishers demanding what were generally called "display promotional allowances" or "promotional allowance rebates" and threatened to discontinue handling a publication if its publisher refused to comply. In the face of this pressure the publishers generally acceded. For example, on June 4, 1956, Mr. Milton Gorbulew, circulation manager of Modern Photography magazine, in response to a demand for a 10 per cent sales rebate on the retail price of the magazine, wrote to Union reluctantly agreeing to grant what Gorbulew called a "stiff rebate." The letter stated: "I assume that if this new rate is unacceptable to us, our magazine would not be distributed on your outlets. In view of this situation we have no recourse but to say yes."

4. In 1958, Union's total sales were approximately $23,940,000, of which approximately $5,280,000 were magazine sales.

Denominating this activity "a classic example of the misuse of the economic power possessed by large buyers,"[5] the Commission found that petitioners had knowingly induced and received from their suppliers discriminatory payments as consideration for services or facilities furnished by petitioners in connection with the sale of suppliers' goods. The Commission concluded that these payments were unlawful under §2(d) of the Clayton Act as amended, 15 U.S.C., §13(d), and held that inducement and receipt of such unlawful payments constituted an unfair method of competition which violated §5 of the Federal Trade Commission Act, 15 U.S.C., §45. The Commission ordered Union and American to cease and desist from the aforementioned practices.

The many questions presented by this appeal from the Commission's opinion and order may be subsumed under five broad issues. First, are these transactions "in commerce" and thus within the scope of §5 and the Commission's jurisdiction? Second, do the knowing inducement and receipt of payments which violate §2(d) of the Robinson-Patman Act amendments to the Clayton Act constitute a violation of §5 of the Federal Trade Commission Act? Third, were the payments in violation of §2(d)? Fourth, did petitioners *knowingly* induce and receive such payments? Finally, would the fact that petitioners' actions were motivated by a desire to resist illegal price-fixing by the publishers constitute a valid defense under §5? Petitioners also raise subsidiary issues which will be discussed.

5. *Union News Co.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1960-1) ¶29,335 (1961).

Appendix

First. The Federal Trade Commission Act, §5(a)(1), 15 U.S.C., §45(a)(1), outlaws "[u]nfair methods of competition in commerce." The gist of the offense charged here is the inducement and receipt of payments violating §2(d) of the Clayton Act, which makes it unlawful for sellers engaged in commerce to make certain discriminatory payments "in the course of such commerce" to their customers. The publishers and national distributors are engaged in interstate commerce; the promotional allowances attacked here were paid in the course of such commerce. So, too, were the petitioners' inducement and receipt of these payments in commerce. Petitioners contend, however, that their dealings in magazines are not in interstate commerce, since the interstate shipments of magazines are broken up and repacked by the wholesaler before being shipped to Union's retail outlets. The concise answer to this contention is that it is irrelevant. There is no question of jurisdiction over the parties or over the sale of magazines *per se.* Jurisdiction is asserted over the questioned *practices,* namely, the use of the bargaining power of an interstate chain of newsstands to secure promotional rebates from giant interstate publishing firms selling magazines nationally through this chain. These practices are within the jurisdictional scope of §§5 and 2(d).

Second. In *Grand Union Co.* v. *F. T. C., supra,* we held that a buyer's knowing inducement and receipt of disproportionate payments for advertising services rendered for its suppliers violated §5 of the Federal Trade Commission Act. Section 2(d) of the Clayton Act forbids sellers to

make such payments, but does not extend its proscription to buyers. This omission, however, was not purposeful. The buyer's receipt of payments is an integral part of the very transaction §2(d) forbids, and represents the very evil the Robinson-Patman Act was designed to cure. Since the buyer's action in *Grand Union* secured for it an advantage over competitors which Congress had declared to be *per se* contrary to public policy, we held that the Commission was justified in denominating the buyer's conduct an unfair method of competition in violation of §5. Similarly, if the payments which Union and American admittedly induced and received were made in violation of §2(d) and if this inducement and receipt are shown to be "knowing," the FTC's conclusion that they were engaging in unfair methods of competition is correct.

Third. Petitioners contend, however, that the payments made by the publishers did not contravene §2(d), because petitioners are not "customers" of the publishers, and because the allowances paid were price adjustments, not true promotional allowances. The latter contention lacks any merit. In the first place the Commission found that special display rights were indeed often given to publishers who paid the promotional allowances. The publishers who acquiesced in petitioners' demands for promotional rebates expressed the hope that they would get better display service as a result. In their letters and bills petitioners frequently referred to these payments as "promotional allowances." Moreover, even if these payments were all no more than disguised price adjustments, as petitioners contend, they would nevertheless violate §2(d). Section

2(d) was aimed explicitly at promotional allowances which have the effect of price adjustments. Sen. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). Allowances for which the services are not performed, or for which the value of the service is lower than the allowance, were prohibited, for these were found to be a major device by which large buyers gained an advantage over their competitors. *Ibid.*

For a payment by a supplier to violate §2(d), 15 U.S.C., §13(d), it must be paid to a "customer" of the supplier, and be made as compensation for services or facilities furnished "by or through such customer." Petitioners, who purchase magazines not directly from the national publisher, but through the intermediary wholesalers and distributors, claim they are not "customers" of the publishers. We disagree. The term "customer" in §2(d) should be given the same meaning as "purchaser" in §2(a) and (e) in order to harmonize parallel sections of a statute aimed at a common purpose. *K. S. Corp.* v. *Chemstrand Corp.*, D. C. S. D. N. Y., 198 F. Supp. 310, Sept. 29, 1961; Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 189. The cases discussing this requirement under §2(a), (d), and (e) indicate that there need not be privity of contract between seller and an ultimate buyer to establish the buyer as a "customer" or "purchaser." If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys. *K. S. Corp.* v. *Chemstrand Corp., supra; Champion Spark Plug Co.*, 50 F. T. C. 30; *Dentists Supply Co. of New York*, 37 F. T. C. 345; *Kraft-Phenix Cheese Corp.*, 25 F. T. C. 557. Cf. *Elizabeth Arden,*

Inc. v. *F. T. C.*, 2 Cir., 156 F. 2d 132, certiorari denied 331 U. S. 806.

Petitioners contend that these cases cited do not govern this proceeding, since, as we make out the argument, in those cases the finding that the "seller-customer" relation existed was based solely on the conduct of the seller in proceedings brought against the seller. It is error, petitioners contend, to wish the sins of the seller on the buyer in this wholly different action against the buyer. Petitioners' argument suggests that the function of the "control" requirement is to punish sellers for illegal price control activity. We do not believe that the "indirect customer" doctrine is so grounded. Rather, it seems to stem from a fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of direct or indirect price discrimination. See *Grand Union Co.* v. *F. T. C.*, *supra*. The method chosen to reach this goal was to forbid *sellers* to make direct or indirect discriminations in price between one purchaser or customer and another, save in certain limited situations. The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty;[6] otherwise the requirement of the

6. But cf. *Klein* v. *Lionel Corp.*, D. C. Del., 138 F. Supp. 560, affirmed 3 Cir., 237 F. 2d 13, affirming a summary judgment for defendant in a treble-damage action brought by Klein, a retailer, who purchased defendant Lionel's products through a wholesaler, while competing retailers were able to purchase directly from Lionel and thereby receive a greater discount. Klein alleged no direct dealings between himself and Lionel and did not show that Lionel controlled the terms set by the wholesaler; and on appeal he raised the point that Lionel's products were fair-traded at the wholesale level and that Lionel therefore did exercise "control" under the rule in *Kraft-Phenix Cheese Corp.*, 25 F. T. C. 557. The Third Circuit rejected the claim, stating that the *Kraft-Phenix* doctrine was not applicable in such an action.

statute could be easily avoided by use of a "dummy" wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors. See *Baim & Blank, Inc.* v. *Philco Corp.*, D. C. E. D. N. Y., 148 F. Supp. 541. Since the requirement is imposed not to punish sellers for their conduct, but to effectuate the purpose of giving protection to buyers' competitors, the "indirect customer" doctrine should apply whether the proceeding is brought against buyer or seller. If control is found, then Union is a "customer" under §2(d). The Commission found that the seller "fixes the prices, terms, and conditions of sale and negotiates directly" with Union; therefore Union is a "customer" of the publishers.

Fourth. Petitioners assert that there is insufficient evidence to support the Commission's finding that they knew that payments which they induced and received were not available to their competitors on a proportionally equal basis. They point out that the negotiations surrounding all attempts by retailers to secure price adjustments were carried on individually, in secret, and were marked by fraudulent representations by the publishers, so that petitioners were unable to learn what terms their competitors were receiving. The test of whether a buyer has knowledge that payments he induces and receives are illegal was laid down for cases brought under §2(f) by the Supreme Court in *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61. By analogy this test is applicable in these §5 proceedings. See *Grand Union Co.* v. *F. T. C., supra.* Although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference

that petitioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient. *Automatic Canteen Co. of America* v. *F. T. C., supra,* 346 U. S. 61, 80. Here the record reveals a series of interrelated facts which, taken as a whole, indicate that the Commission's findings are supported by substantial evidence. Petitioners have a position of near-dominance in the retail newsstand field. They insisted on receiving rebates which represented a steep increase over promotional allowances customarily paid. Publishers often resisted these requests on the ground that the allowances paid would exceed those granted to petitioners' competitors. Finally, the Commission found that not one retailer competing with Union actually received a payment or allowance at a rate "proportionally equal to that paid to petitioners."

Fifth. Petitioners claim that their attempts to secure rebates or promotional allowances were a reaction to illegal price-fixing by the publishers, and that for that reason they should not be found to have engaged in unfair methods of competition. But resort to practices outlawed by the antitrust laws cannot be justified by the fact that the practices were a defense to illegal activity. *Fashion Originators' Guild of America* v. *F. T. C.,* 312 U. S. 457. Moreover, we have held today that inducement and receipt of payments which violate §2(d) are a *per se* violation of §5, so that there can be no question of the "reasonableness" of petitioners' activity. *Grand Union Co.* v. *F. T. C., supra.*

Sixth. We have examined petitioners' remaining substantive contentions and find them groundless in the light

of our view of the major issues herein. Petitioners also state that the Commission's cease and desist order is "ambiguous, overreaching, and oppressive." To the extent that the order extends beyond the actual inducement and receipt of display and promotional allowances—the specific practices involved in these proceedings—we agree that the order is too broadly drawn. *Grand Union Co.* v. *F. T. C., supra.* Moreover, the order forbids an attempt to induce, or inducement of, illegal payments without receipt thereof. Since petitioners both induced and received the payments here, for the reasons stated in *Grand Union Co.* v. *F. T. C., supra,* the order should be so limited. Neither the Commission nor the courts have held that an attempt to induce or inducement (if the two are distinguishable), without a concomitant receipt of illegal payments, violates §5. In *Grand Union Co.* v. *F. T. C., supra,* we explicitly refused to pass on these questions, since the petitioner there had received payments which violated §2(d); and we think we should do the same here, where the petitioner is in like case. Unless and until there is a definite ruling thereto, inducement or attempted inducement alone cannot be considered to be an "identical illegal practice" which the Commission may prohibit under the rule in *Niresk Industries, Inc.* v. *F. T. C.,* 7 Cir., 278 F. 2d 337, certiorari denied 364 U. S. 883.[7]

Petitioners contend that the order places undue burdens on them by forbidding inducement and receipt of pay-

7. We find nothing in the recent opinion in *F. T. C.* v. *Henry Broch & Co.,* 82 S. Ct. 431, which is inconsistent with our finding that the Commission's orders are too broad. As that case suggests, in situations where agency orders are subject to automatic enforcement in civil suits brought by the Attorney General, these orders must be clear and specific.

ments when they know, or *should know*, that proportional payments are not "*affirmatively offered* or otherwise made available" to their competitors. They attack specifically the provisions we have italicized. There is nothing in the Supreme Court's opinion in *Automatic Canteen Co. of America* v. *F. T. C., supra*, 346 U. S. 61, which precludes the imposition of a duty of reasonable inquiry upon a buyer. Indeed, that opinion stated that the Commission might find knowledge under §2(f) that payments induced and received were not cost-justified (the issue there) if it showed two things: first, that the buyer knew of a price differential, and second, that one familiar with the trade should know that such a differential could not be cost-justified. *Automatic Canteen Co. of America* v. *F. T. C., supra*, 346 U. S. 61, 81. Nor can there be any objection to including the term "affirmatively offered." Petitioners seem to feel that this provision makes the order more onerous and imposes a requirement on sellers not called for by §2(d). Whatever may be the merits of petitioners' contention that §2(d) imposes no duty of affirmative offering on sellers, inclusion of this provision cannot prejudice the buyer. As the order now reads, this clause does not change what sellers must do, but simply defines the obligation of the buyer to learn whether payments are "proportionalized." If he is apprised of sufficient information about payments which he induces and receives to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates he may have a further duty to see whether they are "otherwise made available."

The decision of the Commission is affirmed. Pursuant to Rule 13(1), Rules of the United States Court of Appeals for the Second Circuit, the Commission shall enter an order "in conformity with the opinion," to which petitioners may object by timely filing of a counterproposal.

MOORE, Circuit Judge (dissenting):

Just as the decision in *Grand Union Co.* v. *F. T. C.*, decided today, subjected a buyer to sanctions not imposed by Congress under the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C., §13(d), so too does this decision resort to the generalities of Section 5 of the Federal Trade Commission Act, 15 U.S.C., §45 ("unfair competition") to make unlawful that which Congress, although afforded an opportunity to do so, has not forbidden. Under the guise of restraining threats to competition, the result reached by the majority here, in my opinion, has a diametrically opposite effect. The facts clearly support this conclusion.

Petitioners sell at retail newsstands books and magazines published by the publishers here involved. Dissatisfied with the terms of the purchase contracts, petitioners demanded better terms, primarily rebates and compensation for promotional allowances. Apparently, petitioners' purchasing power was such that the publishers, although protesting in some instances, agreed. In any free and competitive economy, both buyer and seller should have the right to consummate the purchase transaction only if mutually satisfied as to terms. A buyer ought to be able to drive as hard a bargain as business expediency warrants; a seller should be able to exact the best terms as

possible from his point of view. Freedom to agree or disagree, I trust, has not been legislated out of existence—by Congress at least. Congress, however, has, in the interest of protecting the buyer in a less advantageous bargaining position, declared that the benefits achieved by the strong shall also be accorded proportionally to the weak. But Congress has never said that a buyer can bargain for better terms only at his peril.[1] Any such law would completely stifle the competitive system. By way of illustration, a buyer desirous of obtaining certain products for 10 cents a pound less might demand such a reduction either in price or in promotional allowances. The

1. The Supreme Court made this point clear in *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 77, (1953) when it said:

> Not only are the arguments of the Commission unsatisfying, but we think a fairer reading of the language and of what limited legislative elucidation we have points toward a reading of §2(f) making it unlawful only to induce or receive prices known to be prohibited discriminations. For §2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer. Of course, such devices for private enforcement of the Act through fear of prosecution could equally well have been achieved by providing that the buyer would be liable if, through the seller or otherwise, he learned that the price he sought or received was lower than that accorded competitors, but we are unable, in the light of congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated. Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.

buyer may be one of 10,000 customers of the seller which customers may range from mass buyers to a country grocery store in a small hamlet. Yet the decision of the Commission and the majority for all practical purposes precl s the buyer from asking for better terms and, ac pting them if granted, unless he first inquires of the seller whether the terms are being made available to others and then to verify any such assurance canvasses all the seller's customers to ascertain whether the seller has made the terms of his bargain available to them. The order proposed would, in effect, require that the potential buyer not enter into his purchase contract until he has ascertained that the prospective seller has "affirmatively offered" proportionally equal terms to all his other customers competing in the sale of his products. To comply with the Commission's order after the buyer and seller had agreed upon their terms, the buyer would have to demand a list of all the seller's customers. This probably would not be forthcoming. However, if it were, the buyer would then have to write to all competing customers disclosing in this competitive age the terms of his proposed purchase and inquire whether the seller had "affirmatively offered" the same, or proportionally equal, terms to them. The more cautious buyer would request proof of such affirmative offer from each of his competitors by affidavits; the more incautious might risk an affidavit from the se er, listing all proportionally equal arrangements made with other customers. Far-fetched though this hypothetical situation may seem, reality is rudely injected into the hypothesis in reading, "Nor can there be any objection to including the term 'affirmatively offered'.",

because it "simply defines the obligation of the buyer to learn whether payments are 'proportionalized'." "If he is apprized of sufficient information [whatever that is] * * * to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates that he may have a further duty to see whether 'otherwise made available'." (Maj. Op., p. 1066). Here then is a direct mandate to all buyers pursuing their supposed right to bargain for better terms than the seller proposes or had previously given that they cannot accept such terms as may be agreed upon unless the buyer "sees first" what the nature of the businesses of hundreds of the Seller's customers may be and then tries to analyze whether the Seller has offered proportionally equal terms to all. The mere statement of such a proposition should be an adequate answer as to why Congress imposed no such burden on buyers. Such a rule would place the bargaining power exclusively in the hands of sellers and be the very antithesis of competition because no buyer could meet the burden. Furthermore, inability of one buyer to seek such benefits would actually prejudice all other buyers because if he were successful the seller would be obliged under 2(d) to confer similar benefits on them.

No prohibition against seeking or receiving promotional allowances even though they turn out to be disproportional has been written into either Section 2(d) or 2(f). There was good reason for the seller-buyer differences in the two sections. Far from being "inadvertent," a consideration of the unequal position of the parties must have led to the

distinct treatment accorded to each in these sections. A seller is in a unique position to know whether he is giving proportionally equal allowances to his customers. The customers could not possibly have such facts available. Ascertainment of price discrimination would be comparatively simple in contrast to obtaining information as to a seller's proportionally equal treatment of buyers. Yet even as to price the Commission must come forward with proof that the effect of the discrimination may be substantially to lessen competition and cannot rely on a *per se* violation. In short, inducement and receipt by a buyer became a violation only after the Commission has sustained its burden and after the buyer has had an opportunity to avail itself unsuccessfully of permitted defenses. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61 (1953). I cannot conceive that Congress intended that the Commission could escape these requirements by prosecuting specific violations of one law (the Clayton Act) under the terms of another (the FTC Act). As Professor Handler says in his "Review of Antitrust Developments," *The Record*, Association of the Bar, New York City, Vol. 17, No. 7, p. 403:

> "Nowhere in the voluminous literature on the history and administration of the Federal Trade Commission Act nor in the comprehensive jurisprudence on unfair methods of competition will one find support for the view that the Commission can avoid limiting statutory language by resort to the broader contours of Section 5."

He continued on p. 406:

> "There is no suggestion in either statute that the provisions of the Clayton Act are to be merged with

> Section 5 and lose their identity as the careful expression of the legislative will on the legitimacy of the practices to which they relate."

I would accept the Handler critique as a sound expression of proper scope of Commission and court powers expressed in his conclusion that (p. 408):

> "Congress vested the Commission with a broad and flexible mandate. But it did not endow it with the power to legislate. In the final analysis a democracy cannot permit its laws to be rewritten by administrative agencies or the executive. Where administration discloses defects or limitations in the laws drafted by Congress with which the techniques of interpretation are unable to cope, the remedy is to request supplemental legislation from the elected representatives of the people who, under our system of government, are the final arbiters of national policy. This has been the settled practice in the antitrust field where numerous legislative changes have been made over the years."

In my opinion, the Commission has rewritten Sections 2(d) and 2(f), thus creating laws which Congress for good reason has not enacted. The petitioners have not violated those laws which Congress chose to enact and, hence, I would set aside the Commission's order.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 26857

AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

The American News Company and The Union News Company, corporations, petitioners herein, having filed in this Court on March 14, 1961, a petition to review and set aside an order to cease and desist issued against them on January 10, 1961, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of American News Company, The Union News Company, corporations, Docket No. 7396"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on October 10, 1961; and this Court having rendered its decision on February 7, 1962;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

> "IT IS ORDERED that the respondents, The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:
>
> "Receiving, or inducing and receiving, or contracting for the receipt of, anything of value from any of their suppliers as compensation or in consideration for display or promotional services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondents in the sale and distribution of such suppliers' products."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist as hereby modified, be, and it

hereby is, affirmed, and that petitioners be, and they hereby are, commanded forthwith to obey said order and to comply therewith; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ninety (90) days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with said order to cease and desist as hereby modified, affirmed and enforced.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby modified, affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with its decree and to prevent evasions thereof.

CHARLES E. CLARK
STERRY R. WATERMAN

United States Circuit Judges

Dated: April 27, 1962

Appendix

THE GRAND UNION COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 7, Docket 26553.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Argued Oct. 10, 1961.

Decided Feb. 7, 1962.

Proceeding on petitions to review an order of the Federal Trade Commission directing petitioner to cease and desist from knowingly inducing, receiving, or contracting to receive any payments for sales services which its suppliers were forbidden by 2(d) of the Robinson-Patman Act, 15 U.S.C.A. 13(d), to make.

Modified and affirmed.

Moore, Circuit Judge, dissented.

For the petitioner: William Piel, Jr., with John F. Dooling, Jr., and Frederick A. Terry, Jr., on brief, all of Sullivan & Cromwell, New York, N. Y.

For the respondent: E. K. Elkins, Attorney, with James Mcl. Henderson, General Counsel, and Alan B. Hobbes, Assistant General Counsel, on brief, Federal Trade Commission, Washington, D. C.

Before—CLARK, WATERMAN and MOORE, Circuit Judges.

CLARK, Circuit Judge. This is a petition to review an order of the Federal Trade Commission, ordering peti-

tioner, The Grand Union Company, operator of a large chain of retail grocery stores and supermarkets, to cease and desist from engaging in certain business practices held to violate §5 of the Federal Trade Commission Act, 15 U.S.C., §45. The order was entered upon a stipulation of facts with annexed exhibits submitted to the hearing examiner.

The proceeding arises out of a co-operative advertising arrangement, entered into jointly by Grand Union and a group of its suppliers, with Douglas Leigh, Inc., an advertising firm which owns and operates a "spectacular" advertising sign located on Broadway in the Times Square area of New York City. This sign, which covered two sides of a building, combined several large panels for stationary displays with one which contained a so-called "Epok Panel"—a bank of timed electric lamps against a black background which were used for the projection and display of animated advertisements.

On August 6, 1952, Grand Union accepted a proposal submitted to it by Douglas Leigh, Inc. By the terms of this agreement Leigh was to lease the 3625-square-foot sign to Grand Union for $50 per annum. The bulk of the sign area would be devoted to stationary displays to be designed by Leigh for Grand Union. In return, Grand Union was to solicit fifteen "participating advertisers" to buy time on the Epok Panel. Each participating advertiser would enter into a separate agreement with Leigh to rent space on the panel at a rate of $1,000 per month for one minute out of each twenty minutes in which the panel operated; thus the participating advertisers were to sign for 75 per cent of the panel's time. Grand Union received

the other 25 per cent of the time on the panel, which it could use for its own advertisements, or exchange for radio or TV time. No design, layout, or copy could be used on any portion of the sign without approval by Grand Union in writing. The contract ran for one year, and Grand Union was given the option to renew it for two additional one-year periods. Leigh had the right to cancel the contract if Grand Union failed to secure fifteen contracts from participating advertisers.

A year later this contract was renewed, with modifications. Under the new terms there were to be twenty participating advertisers, each having one minute out of every twenty on the Epok Panel. Instead of receiving 25 per cent of the time on the panel, Grand Union would receive 5 per cent of the monthly rentals paid Leigh by the first fifteen participating advertisers and all of the rental paid by the remaining five. In substance this agreement continued until December 31, 1956, when the entire "co-operative" venture ended.

In the four-year period during which this spectacular sign was in operation on Times Square, thirty firms became participating advertisers. Most were solicited by Grand Union; others were brought into the project by Leigh. All, or almost all, were suppliers of Grand Union. None of the advertisers knew the terms of Grand Union's contract with Leigh: either that Grand Union paid little or nothing for its space on the sign or that Grand Union received substantial payments from Leigh by virtue of their participation. Grand Union knew and approved of all the agreements between the participating advertisers and Leigh.

Many of the participating advertisers had co-operative advertising and promotional allowance programs publicly announced and made available to all customers. Generally, however, these firms did not consider their participation in the Broadway spectacular part of those widespread promotion programs. In some instances suppliers paid Grand Union under these general programs, in addition to participating in the co-operative spectacular project. On December 5, 1957, the Federal Trade Commission issued a complaint, which charged that Grand Union, by "knowingly inducing or receiving * * * special payments and benefits from suppliers which were not made available on proportionally equal terms to [its] competitors," committed "unfair methods of competition and unfair acts and practices" in violation of §5 of the Federal Trade Commission Act.

These transactions were before this court recently in *Swanee Paper Corp.* v. *F. T. C.*, 2 Cir., 191 F. 2d 833. In that case we held that Swanee, one of the participating advertisers in this Broadway spectacular sign, had, by participating in the program, violated §2(d) of the Clayton Act as amended, 15 U.S.C., §13(d). This section, part of the Robinson-Patman Act amendments to the Clayton Act, makes it unlawful for a seller to pay anything of value "to or for the benefit of" his customers for services or facilities furnished "by or through" the customer in connection with the sale of seller's product "unless such payment or consideration is available on proportionally equal terms to all other" competing customers of the seller. In *Swanee* we found that payments by the seller (Swanee) to Douglas Leigh, Inc., were made for the bene-

fit of the buyer (Grand Union) and that the services or facilities were rendered "by or through" the buyer. There being no dispute in *Swanee* that the payments were not available on a "proportionally equal" basis; we therefore upheld the decision of the Commission that Swanee had violated §2(d). In the instant case the Commission is proceeding against the buyer in the same transactions, but not under this provision of the Act.

Section 2(d), as most of the Robinson-Patman Act, is aimed only at sellers; it makes no mention of buyers, even though it is difficult to conceive of a transaction violating §2(d) which did not involve a buyer as well as a seller. Two provisions of the Robinson-Patman Act, however, apply by their terms to buyers: (1) §2(c), 15 U.S.C., §13(c), which outlaws payment and receipt of certain brokerage allowances, and (2) §2(f), 15 U.S.C., §13(f), which provides that "[i]t shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section." The Commission does not maintain that the payments made for the benefit of Grand Union are price discriminations within the meaning of §2(f), and thus is not proceeding against the buyer (Grand Union) under the Robinson-Patman Act. Rather, it has here determined that a buyer who knowingly solicits and receives payments which are unlawful under §2(d) is, notwithstanding that section's silence as to buyers, nevertheless engaged in unfair methods of competition or unfair trade practices. The Commission claims that the very purpose of §5 is to permit it to make such a determination and to bolster other antitrust statutes by outlawing acts

which violate their "spirit," but not their letter.[1] Petitioner contests this determination, claiming that because Congress left buyers free of liability for their part in transactions outlawed under §2(d), the Commission is powerless to impose such liability under §5. Neither party discusses the possibility that §2(f) might be held to apply here.

We need not determine whether the payments made by the participating advertisers to or for the benefit of Grand Union are "a discrimination in price" within the meaning of §2(f). The question whether or not that section outlaws activity such as petitioner's was left open in *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61, 73 n. 14. There the Court, construing it, explicitly declined "to pass on the question whether a 'discrimination in price' includes the prohibitions in such other sections of the Act as §§2(d) and 2(e)." This issue was not raised in the proceedings below.

If the Commission were proceeding against petitioner under §5 solely because its activities contravened §2(f), there might be a question of the propriety of utilizing the vague language of §5 rather than the precise standards of the Clayton Act. It has been suggested that §5 "should *not* be invoked whenever the transaction in question is governed by specific provisions in the Clayton Act."[2] Since the Commission has explicit authority to enforce

1. See the Commission's decision herein: *The Grand Union Co.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations) ¶ 28,980 (FTC Aug. 12, 1960).

2. Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 148-149 n. 78; Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 Mich. L. Rev. 821, 851 (1961).

the Clayton Act, §11, 15 U.S.C., §21, the chief reason for such a requirement would seem to be a fear that complaints issued in the imprecise language of §5 will not give parties adequate notice of the offenses charged and relevant defenses thereto.[3] This fear seems misplaced. Proceedings are frequently brought under this section against Sherman Act violations. *F. T. C.* v. *Cement Institute, Inc.* [1948-1949 TRADE CASES], 333 U.S. 683, 693; *F. T. C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 19 A. L. R. 882. Litigants are not prejudiced thereby; complaints are so drafted that the particular Sherman Act offense is indicated. *F. T. C.* v. *Cement Institute, Inc.*, *supra*. There is no reason why this cannot be done under the Clayton Act. The complaint in the instant case gives adequate notice of the nature of the offense charged, and has certainly given petitioner ample opportunity to raise defenses.

Moreover, in *Fashion Originators' Guild of America* v. *F. T. C.* [1940-1943 TRADE CASES], 312 U. S. 457, the Supreme Court affirmed a holding by the Commission that a group boycott which violated §3 of the Clayton Act, 15 U.S.C., §14, constituted an unfair method of competition. For *this case, however, we need not decide whether activity* which violates the Clayton Act should *ipso facto* be a violation of §5. The Commission here contends that petitioner's activity violates §5 regardless of whether or not it may be a violation of the Clayton Act; we see no objection to consideration of this contention without an examination of §2(f). We may turn, therefore, to the question originally presented: Does §5 extend to petitioner's activity which, while an integral part of a trans-

3. Oppenheim, *supra* note 2, at 836-837.

action outlawed by §2(d) of the Clayton Act, nevertheless is not expressly proscribed by that statute or indeed by any other antitrust statute?[4]

This case has been widely mooted in the law reviews.[5] Distinguished commentators have suggested that the Commission here asserts legislative powers which if sustained will permit it to reformulate antitrust law in disregard of specific acts of Congress, and to use the vague concept "unfair methods of competition" to "supply what Congress has studiously omitted" from specific antitrust statutes.[6] Fear is expressed that the "spirit" of the Clayton Act will haunt the antitrust laws, emerging wraithlike when the Commission utters the incantation "section 5."[7] It has been adumbrated that under the Commission's rule in this case it could supply omissions in the Clayton Act

4. The Commission has framed the complaint in the language of §2(f) of the Clayton Act, claiming the Grand Union has knowingly induced or received illegal payments. *Inducement* might be read as not requiring receipt, and hence a buyer could violate §5 even though the seller did not violate §2(d). Thus §5 might be read to apply to the buyer's attempts to have the seller violate §2(d). We need not decide this question, as receipt was shown here.

5. Alexander, *Section 5 of the Federal Trade Commission Act, A Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act,* 12 Syracuse L. Rev. 317 (1961); Handler, *Annual Review of Antitrust Developments,* 16 The Record 385 (1961); Handler, *Recent Antitrust Developments,* 71 Yale L. J. 75 (1961); Oppenheim, *supra* note 2; Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?* 5 Antitrust Bull. 533 (1960); Note, 61 Col. L. Rev. 291 (1961); Note, 49 Geo. L. J. 379 (1960); Note, 8 U. C. L. A. L. Rev. 243 (1961); see also Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law,* 5 Antitrust Bull. 161 (1960).

6. Handler, *supra* note 5, 16 The Record 385, 402-403, 71 Yale L. J. 75, 91, quoting from *F. T. C. v. Simplicity Pattern Co.* [1959 TRADE CASES ¶69,361], 360 U. S. 55, 67.

7. Oppenheim, *supra* note 2, at 837-838.

left by Congress for a specific purpose; for example, in an earlier day it might have "plugged the assets loophole in original Section 7 without any amendatory legislation."[8] While we are sympathetic to this concern over possible misuse of §5, we feel it is misplaced in the instant case.

In the first place there seems to be no specific reason why Congress omitted buyers from the coverage of §2(d), while including them under §2(e) and (f); the omission was more "inadvertent"[9] than "studious." Certainly buyers were not left out because Congress favored them or wished to permit them to engage in activity proscribed to sellers. The Robinson-Patman Act was enacted in 1936, following an investigation of large chain-store buyers, to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F. T. C. v. Henry Broch & Co.* [1960 TRADE CASES ¶69,728], 363 U.S. 166, 168.[10] The Act outlaws several specific practices connected with the sale of commodities which had been utilized by large buyers to secure from their suppliers preferences not generally available; among these were "dummy" brokerage payments[11] and disproportionate advertising

8. Handler, *supra* note 5, 16 The Record 385, 402, 71 Yale L. J. 75, 92.

9. One of the authors of the Robinson-Patman Act has suggested that the failure explicitly to include under the ban of §2(f) inducement and receipt of payments violating §2(d) and (e) was inadvertent. See Dunn, *Section 2(d) and (e)*, New York State Bar Association Robinson-Patman Act Symposium 55, 61 (CCH 1946).

10. See remarks of Representative Patman, 80 Cong. Rec. 8111 (1936).

11. *F. T. C. v. Henry Broch & Co.* [1960 TRADE CASES ¶69,728], 363 U. S. 166, 169; *F. T. C. v. Simplicity Pattern Co.* [1959 TRADE CASES ¶69,361], 360 U. S. 55.

and similar allowances.[12] Despite the evident purpose of the Act, and for reasons not apparent in the Congressional history, many of these practices were made specifically unlawful for only one of the participants in the underlying economic transaction. The practices themselves, however, were declared contrary to the public interest and therefore unlawful. Since, in the case of §2(d) violations, there could be no unlawful preference made by a seller unless it was received by a buyer, it is clear that Congress did not intend to sanction buyers to continue to engage in the unlawful activity.[13]

Thus the basis for resort to §5 in the instant case differs substantially from that presented by such early decisions delineating the scope of §5 as *F. T. C.* v. *Curtis Pub. Co.*, 260 U. S. 568, and *F. T C.* v. *Sinclair Refining Co.*, 261 U. S. 463. In *Curtis* and *Sinclair* the FTC attacked exclusive dealing arrangements under both §5 and §3 of the Clayton Act. In both cases the Court found that arrangements did not violate the Clayton Act. The *Curtis* agreement was held to be one of agency, not sale, and therefore not within the prohibition of §3. Similarly, in

12. See Final Report on the Chain Store Investigation, Sen. Doc. No. 4, 74th Cong., 1st Sess. (1934); *F. T. C. v. Simplicity Pattern Co.*, [1959 TRADE CASES ¶69,361], 360 U. S. 55.

13. Indeed, §3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C., §13a, makes it a criminal offense for any person "to be a party to * * * any transaction of sale * * * which discriminates to his knowledge against competitors of the purchaser, in that, any * * * advertising service charge is granted to the purchaser over and above any * * * advertising service charge available at the time * * * to said competitors in respect of a sale of goods of like grade, quality, and quantity." This section is not frequently invoked, and to our knowledge has not been utilized against violators of §2(d), although the language is sufficiently broad to cover either party to a transaction in violation thereof.

Sinclair the Court held that agreements by gas station operators to use pump equipment supplied by Sinclair below cost solely to pump Sinclair gasoline did not bind the operators not to "use or deal in the * * * commodities of a competitor" of Sinclair, and that therefore §3 did not apply. Since in both cases the economic activity was significantly different from that outlawed by the Clayton Act, falling outside its "spirit" or policy, no question of using §5 to "supplement or bolster" the Clayton Act was raised.[14]

In *Sinclair* and *Curtis*, the Court did not consider its rejection of the Clayton Act charge dispositive of the §5 issue, for it went on to consider the question of a possible §5 violation on its own merits. The later decision in *F. T. C.* v. *Eastman Kodak Co.*, 274 U.S. 619, however, clearly raised the question whether activity not proscribed by the Clayton Act might, by virtue of its exclusion from that statute, be beyond the reach of §5. In *Kodak*, the Commission issued a cease and desist order under §5, directing Eastman Kodak and Allied Laboratories to terminate an agreement whereby Allied agreed not to use foreign-made film on condition that Kodak would not operate several film laboratories it had acquired to compete with Allied. The order further directed Kodak to divest

14. In *Curtis*, the agency agreement created a set of relationships and responsibilities unlike that which would have resulted from contracts of sale. Under the antitrust laws the difference between a "sale" and an agency relationship is not simply one of form, but may be "outcome-determinative." *United States v. General Elec. Co.*, 272 U. S. 476. And in *Sinclair*, the very heart of a §3 violation—sale conditioned on buyer's refusal to purchase the goods of seller's competitor—was lacking. Moreover, in neither case was there proof of injury to competition, which would have been necessary under the Clayton Act. See Howrey, *supra* note 5, at 166.

itself of the laboratories. The Court upheld the order commending termination of the agreement, but set aside that part ordering divestiture. *F. T. C.* v. *Eastman Kodak Co.*, *supra.*

It had earlier been held that the Commission lacked power under §§7 and 11 of the Clayton Act to order any divestiture of *assets*, even if they had been acquired by means of an unlawful stock purchase, since the "purpose of the [Clayton] Act was to prevent continued holding of stock and the peculiar evils incident thereto." *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554, 561. The Court in *Kodak* considered *Western Meat's* holding that the Clayton Act did not give the Commission such power dispositive of the question whether it might have such powers under §5. *F. T. C.* v. *Eastman Kodak Co., supra*, 274 U. S. 619, 624. For this reason, it was unnecessary to consider whether acquisition and retention of the assets constituted "unfair methods of competition," even though control of the assets was an integral part of the illegal agreement. 274 U. S. 619, 630.

While the situation in *Kodak* bears similarities to the instant case, there are marked differences which are controlling. *Western Meat* explicitly held that §7 of the Clayton Act extended only to acquisitions by stock ownership. The Court recognized that it was the harmful effect of holding companies and other forms of stock ownership which §7 was designed to curb. This notion that §7 was limited to the evils of stock ownership was reiterated by the *Kodak* decision. Since the Court there found that the limitation of the language of §7 to stock ownership reflected a specific Congressional purpose, resort to §5

could not be based on the need to supplement any Clayton Act policy. Thus *Kodak* presents very different questions from those posed by the instant situation, for, unlike the earlier case, the Commission is not here utilizing §5 to create a substantive extension of the Clayton Act. We do not agree that the Commission's opinion here represents an attempt to "supply what Congress has studiously omitted."[15]

Nor can we accept the notion that the Commission is here legislating a "new antitrust prohibition."[16] The practice itself is clearly proscribed by §2(d); the novelty is solely in the application of §5 to a buyer's knowing receipt of unlawful payments. The Commission is not upsetting specific Congressional policies; the proceedings did not "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act."[17] No economic activity, once lawful, has been suddenly brought within the prohibition of the anti-trust laws. Jurisdiction, perhaps, has been expanded from the technical confines of §2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of *buying* power.

The Commission's decision here is entirely consistent with the basic purpose and policy of §5 of the Federal Trade Commission Act. That section did not define "unfair competition"; the concept was left flexible, so that the

15. See note 6 *supra*.

16. Commissioner Tait, dissenting below. *The Grand Union Co.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations) ¶28,980 (FTC Aug. 12, 1960).

17. See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, 149 n. 78.

Commission could apply the broad Congressional standard to the myriad fact situations which would arise. The Act was intended to give the Commission the power to "hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." *F. T. C. v. Cement Institute, Inc., supra,* 333 U. S. 683, 693. Activity which "runs counter to the public policy declared in the Sherman and Clayton Acts" is an unfair method of competition. *Fashion Originators' Guild of America v. F. T. C., supra,* 312 U. S. 457, 463. Moreover, the Act was intended to be prophylactic: to stop in their incipiency acts which when full-blown would lead to monopoly or undue hindrance of competition. *F. T. C. v. Raladam Co.,* 283 U. S. 643, 647, 79 A.L.R. 1191; *Fashion Originator's Guild of America v. F. T. C., supra; F. T. C. v. Motion Picture Advertising Service Co.* 344 U. S. 392, 395.

Grand Union's activities are inconsistent with the purpose of §2(d) of the Clayton Act, and one need not resort to metaphysical subtleties to denominate its conduct an unfair method of competition. Section 2(d) represents a Congressional determination that payments such as those made by the participating advertisers to or for the benefit of Grand Union give a firm in Grand Union's position an advantage over its competitors, especially over smaller retail firms. The Commission has found that Grand Union knowingly received the payments even though equivalent allowances were not made available to other retail grocers, large or small. Thus, by benefit of its size, Grand Union was able to secure competitive benefits in the form of free advertising and cash payments which

lowered the real cost of the supplies it purchased from the participating advertisers—benefits which Congress declared to be contrary to public policy.[18] One of the original aims of §5 was to "protect small business against giant competitors." *F. T. C.* v. *Raladam Co., supra,* 283 U. S. 643, 650. Using the policies of §2(d) as a yardstick, the Commission has declared Grand Union's conduct to be "unfair." The plain meaning of the word would seem to support this conclusion. Congress established the Federal Trade Commission as an expert body to apply the imprecise standards of §5, and "[i]ts expert opinion is entitled to great weight in the reviewing courts." *Jacob Siegel Co.* v. *F. T. C.*, 327 U. S. 608, 644; *F. T. C.* v. *Cement Institute, Inc., supra,* 333 U. S. 683, 720. We see no reason to upset the Commission's determination.

Petitioner further contends that the Commission must prove injury to competition as an element of the §5 violation. We disagree. Section 2(d) defines an offense which is illegal *per se*. *F. T. C.* v. *Simplicity Pattern Co.*, 360 U. S. 55. There is no reason why this rule should not apply to the buyer as well as to the seller. Congress has made no such distinction; §2(f), being the corollary of §2(a), requires proof of injury to competition in cases brought against buyers, while §2(c) applies a *per se* rule

18. The Senate Report on §2(d) stated: "Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case *the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so*." [Emphasis supplied.] Sen. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936).

to buyers as well as sellers. *Ibid.* Since §5 is here utilized to reach an integral part of a violation of §2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller. Cf. *F. T. C.* v. *Simplicity Pattern Co., supra,* 360 U. S. 55. In making some, but not all, of the practices outlawed by the Robinson-Patman Act illegal *per se,* Congress indicated that those selected for *per se* treatment always led to the undesired effects on competition. And *per se* violations are not unknown under §5; price-fixing, declared illegal *per se* under the Sherman Act in *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 50 A.L.R. 989, is a violation of §5. *F. T. C.* v. *Beech-Nut Packing Co., supra,* 257 U. S. 441, 19 A.L.R. 882; *Standard Container Manufacturer's Ass'n* v. *F. T. C.,* 5 Cir. 119 F. 2d 262.

Of course there are unique problems in the application of §5 of the Federal Trade Commission Act to the buyer who engages in a transaction outlawed by §2(d) of the Clayton Act. Section 2(d) does not outlaw all payments by sellers for services or facilities rendered by their customers; it declares unlawful only those which are not offered on a proportional basis to all customers. Unlike the seller, the buyer has no control over those payments —he cannot insure that they are "proportionalized." It may be difficult even to find out whether the seller is making proportionately equal allowances available. The data are often in seller's files; and even if information is publicly available, it may be difficult to make the subtle

assessments necessary to determine "proportionality."[19] It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition. The Commission in this case has correctly limited the complaint to "knowing receipt or inducement" of disproportionate payments; and the record supports its finding that Grand Union knew, or in the exercise of reasonable care should have known, that the payments received had not been made proportionally available to its customers. Cf. *Automobile Canteen Co. of America* v. *F. T. C., supra,* 346 U. S. 61.

In this case, presenting an admittedly novel application of §5 of the Federal Trade Commission Act, what we said as to the need for specificity in Commission orders in *Swance Paper Corp. v. F. T. C., supra,* 2 Cir., 291 F. 2d 833, 837-838, has especial significance.[20] As under the new enforcement provisions of the Clayton Act, 15 U.S.C., §21, so under §5(1) of the Federal Trade Commission Act, 15 U.S.C., §45(1), violations of the order are

19. Sellers are not limited to allowances for a single type of promotional program. They may offer allowances to customers for a variety of programs tailored to the customer's needs, and still meet the requirement of "proportional equality." But the supplier must provide *bona fide* reasonable alternatives; he cannot offer a customer a service if "the economic status of [his] business renders him unable to accept the offer," for that is "tantamount to no offer to him." *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.,* 7 Cir. 258 F. 2d 831, 839, certiorari denied *General Foods Corp. v. State Wholesale Grocers,* 358 U. S. 947.

20. Grand Union has filed a separate petition for review seeking modification of the broad terms of the order. But since this relief can be sought on the original petition, see *Swance Paper Corp. v. F. T. C.,* 2 Cir., 291 F. 2d 833, we grant the Commission's motion to dismiss this second petition.

enforceable in civil proceedings in the federal courts. Administrative agencies have a wide discretion to frame orders enjoining continuation of past practices found unlawful, as well as similar or related future violations. *F. T. C.* v. *Mandel Bros., Inc.* [1959 TRADE CASES ¶69,342], 359 U. S. 385. But this discretion does not permit an injunction of all violations of the statute just because a single violation has been found. *N. L. R. B.* v. *Express Pub. Co.*, 312 U. S. 426. Grand Union's violations cannot be considered flagrant. In this highly uncertain area of the law Grand Union cannot be held to have known to a certainty that its part in the transactions was a violation of §5. The arrangement attacked here has terminated, and there is nothing in the record to suggest that Grand Union intends to resume this or any related activity. We therefore hold that the order should be limited to the particular practice found to violate the statute. *Swanee Paper Corp.* v. *F. T. C.*, *supra*, 2 Cir., 291 F. 2d 833, 838. Further, since Grand Union here received as well as solicited payments, the order should also be limited to a prohibition of either knowing receipt or knowing inducement and receipt. We have not decided whether inducement may be construed to mean solicitation without receipt, and we do not believe this issue of law should be first tested in a proceeding to enforce a cease and desist order.[21]

The decision of the Commission is affirmed. Pursuant to Rule 13(1), Rules of the United States Court of

21. We find nothing in the recent opinion in *F. T. C.* v. *Henry Broch & Co.*, 82 S. Ct. 431, which is inconsistent with our finding that the Commission's orders are too broad. As that case suggests, in situations where agency orders are subject to automatic enforcement in civil suits brought by the Attorney General, these orders must be clear and specific.

Appeals for the Second Circuit, the Commission shall enter an order "in conformity with the opinion," to which petitioner may object by timely filing of a counterproposal.

MOORE, Circuit Judge (dissenting):

The importance of this case is to be found not so much in its "cease and desist" order that a large grocery chain refrain from seeking for itself promotional benefits from sellers which were probably not granted to others but in its holding, in effect, that the Federal Trade Commission can arrogate to itself the legislative powers of Congress whenever there appears a field which Congress has not covered but which the Commission believes should be covered by legislation of its own making.

For the purpose of achieving moderate brevity, oversimplification may be in order. To regulate various business practices deemed to be inimical to our free enterprise economy and the public welfare Congress had passed the Sherman, Clayton and Federal Trade Commission (FTC) Acts. Specific practices were prohibited and in the FTC Act (see 5(a)(1)) "unfair methods of competition" were declared unlawful.

Time passed during which each of the Acts was used by the Justice Department and the Commission to prosecute and restrain violations. For the most part, the Justice Department was the watchdog for Sherman and Clayton Act violations and the Commission for "unfair competition" practices as that term was used in common legal parlance[1] although there was some overlapping.

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1. "opposed to good morals because characterized by deception, bad faith, fraud or oppression"; *FTC v. Gratz*, 253 U. S. 421, 427 (1920).

As the result of the growth of giant chain stores, by the mid-thirties, the large quantity buyer had assumed a place in our economy far greater than was true when Congress passed the Clayton and FTC Acts some twenty years earlier. Such concentration of power naturally placed the many smaller units in a non-competitive position. Investigation ensued. After its investigation had revealed the specific factual situations with which it desired to cope, Congress set itself to the task of formulating equally specific statutes to remedy the evils disclosed so far as it believed certain conduct should be declared unlawful. The result was the Robinson-Patman amendments to the Clayton Act which Congress must have hoped would remedy such evils.

In reading these amendments, the purpose of their enactment must be kept in mind. In enacting legislation, Congress must be presumed to intend to authorize or to prohibit those acts which are embraced within the language of the particular statutes enacted. And where the language is clear and unambiguous, the scope and coverage of the statute should be circumscribed thereby. As expressed by its co-sponsor, Congressman Patman, his bill was "to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor" (79 Cong. Rec. 9078 (1935)). Thus, Congress was intent upon telling the buyer and the seller quite specifically what they could or could not do, each within its own orbit of activity. Congress thereby was not writing a series of defini-

tions applying to the general term "unfair competition" of the FTC Act. Quite to the contrary, it was prohibiting certain practices in no manner dependent upon the basic facts underlying a legal conclusion of unfair competition. The amendments are completely integrated and unambiguous. They do not have to receive support from any section of the FTC Act (except for enforcement). Each of the subparagraphs is designed to serve its own separate purpose.

Section 2(a), directed against sellers, prohibited discrimination in price between purchasers but only where such discrimination had an anti-competitive effect. Sections (c) and (e), relating primarily to sellers and to brokerage and services, are not applicable here. The two sections here involved are sections 2(d) and 2(f). Section 2(d), a seller's section, makes it unlawful to pay "to or for the benefit of a customer" compensation for services furnished by the customer which are not made available on proportionally equal terms to all other customers competing in the distribution of the commodity sold. In other words, what the seller gives to one he must make available to the other. No words are found in the section making it unlawful for the buyer to receive such payments for services. The failure to include the buyer clearly could not have been inadvertent because the very purpose of the legislation was to curb the power of the mass buyer. Moreover, it would, indeed, have been anomalous in a statute designed to encourage competition to put the stamp of unlawfulness on buyers who attempted to secure better commercial advantages for themselves before making their purchases.

Section 2(f) is a buyer's section making it unlawful for him "to induce or receive a discrimination in price." Two qualifications are specified. The act must be done "knowingly" and the discrimination, limited to "price," must be one which is "prohibited by this section [Sec. 2]." The Commission, however, is not proceeding under this section obviously because "price" is not involved and because it does not wish to be burdened by the proof required to support a violation.

The complaint is a hybrid. Certain words of section 2(f), "knowingly inducing or receiving," are combined with the provisions of 2(d), namely, benefits not "made available on proportionally equal terms." The Commission then adds phrases to be found in 2(a) that the practices complained of "are to the prejudice and injury of competitors and the public" and have a tendency to obstruct and restrain commerce. Unable to charge (much less prove) a violation of 2(a), 2(d) or 2(f) and unable to avoid the inexorable mathematical law that three zeros still total zero, the Commission precipitately abandons the Clayton Act which had so generously contributed its language (but not its blessing) to the complaint and by *force majeure* seeks the protection of its natal act, alleging that Grand Union is guilty of "unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act." Having just cast off sections 2(d) and (f), the Commission quickly returns to them to turn (by some alchemic process) these two paragraphs not violated by Grand Union into a violation of section 5.

The Commission cannot find any direct Clayton Act violation and, therefore, has to rely on a violation of its

"spirit" as constituting unfair competition. So, likewise, is the majority forced to concede that Grand Union's activity "is not expressly proscribed by that statute [sec. 2(d)] or indeed by any other antitrust statute." (Maj. Op., p. 1037) and that the Commission is using section 2(d) "notwithstanding that section's silence as to buyers" to support its conclusion of unfair competition by a buyer. (Maj. Op., p. 1035).

This case, as the majority concedes presents "an admittedly novel application of §5 of the Federal Trade Commission Act"—as indeed it does. And yet there is really not so much novelty as there is presented a good illustration of a difference in judicial philosophies, namely, whether Commissions and courts are to interpret and enforce the laws which Congress has enacted or whether they should by judicial legislation create laws which in their opinions they believe should have been enacted. Thus, in this case neither the Commission nor the majority can understand why a Congress, which carefully delineated the sanctions it wished to impose against sellers and buyers, omitted buyers from the coverage of §2(d). For want of any justifying reason, they conclude that the omission must have been "inadvertent"—scarcely flattering to a Congress which had the benefit of a lengthy investigation on the subject and showed itself quite capable of dealing with those who received (2(c), 2(f)) insofar as it felt it should deal with them.

Another consequence of Commission and judicial legislation is that all such laws are *ex post facto*. It has always been a sound policy (if only from the point of view of fair play) that businessmen have an opportunity

to know that which is permitted and that which is proscribed so that they may act accordingly. When our system permits any group of individuals whether they be commissioners or judges to substitute their personal conceptions of the "spirit" instead of the words of our statutes, we, indeed, have a government of men and not laws.

Regardless of half-hearted disclaimer, the Commission and the majority in supporting its decision are actually rewriting either section 2(d) or 2(f). They are either adding to 2(d), in substance, the words "and it shall also be unlawful for any such person to receive such benefits" or they are deleting from 2(f) the words "discrimination in price which is prohibited by this section" and substituting the words "any of the benefits set forth in 2(d) above." As Commissioner Tait so directly says in his clarion dissent, the decision "in effect, legislates a new antitrust prohibition."

Referring to the Commission's decision, Professor Handler, who has long been an astute analyst of developments in the antitrust field, has said: "The plain implication of the opinion is that the Commission, whenever it discovers limitations in legislative language which cannot be overcome by the liberal processes of statutory construction, can utilize the convenient vagueness of the concept of 'unfair methods of competition' as an independent source of power 'to supply what Congress has studiously omitted'[111] [Footnote 111: *"Federal Trade Commission* v. *Simplicity Pattern Co.* [1959 TRADE CASES ¶69,361], 360 U. S. 55,.67 (1959)] from its enactments." (Handler, Review of Anti-trust Developments, The Record, Ass'n of

the Bar of the City of New York, Vol. 17, No. 7, p. 402, October, 1961.)

The majority frankly recognize that, "Distinguished commentators have suggested that the Commission here asserts legislative powers which, if sustained, will permit it to reformulate antitrust laws in disregard of specific acts of Congress" and are "sympathetic to this concern over possible misuse of §5" but they find "no specific reason why Congress omitted buyers from the coverage of §2(d)" and, hence, conclude that the omission must have been more inadvertent than studious. If, however, the Commission under Section 5 has such broad unlimited powers to fill in assumed omissions, then "the specific acts of Congress in the antitrust field which the Commission administers are essentially superfluous" (Handler, pp. 402-3).

Moreover, even if it be assumed that the Commission can fathom the unenacted intent of Congress and amend either section 2(d) or section 2(f) (by way of Section 5 of the FTC Act) so as to reach buyers knowingly receiving unlawful payments, there still remains the question of whether injury to competition must be shown. While a seller's participation in a 2(d) transaction is a *per se* violation, a buyer's participation in a 2(f) transaction is not. A buyer's conduct cannot be condemned under 2(f) unless the Commission can show injury to competition. Thus, if we assume with the majority that Section 5 can be used to reach buyers such as Grand Union, we still must decide whether to look to 2(d) or to 2(f) to determine the other "indicia of illegality." In answering this question, the majority again feels that it can clearly sense

the pulse of Congress in 1936 and concludes that Congress would have wanted the court to make the buyer's participation in a 2(d) transaction a *per se* violation of Section 5. My senses are not so keen, and I cannot find any evidence that Congress would have expanded 2(d) rather than 2(f) —had it desired to extend the Act to buyers.

Without evidence of specific Congressional intent, we should not be responsible for creating a *per se* violation. To do so is to ignore the policy conflict of the Robinson-Patman Act with the other antitrust laws, including the FTC Act. See Mr. Justice Frankfurter, dissenting in *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 405 (1953). To the extent that the Robinson-Patman Act inhibits price and service competition generally, it may often conflict with the objective of the antitrust laws of protecting and fostering vigorous competition for the benefit of the public (and not for the benefit of the individual competitors). The Supreme Court has indicated that, where Congress has left the courts free to make the determination, this conflict is to be resolved in favor of the "broader policies" of the antitrust laws. *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 74 (1953). The narrow areas of *per se* illegality which Congress created in the Robinson-Patman Act should not be expanded by us. We should not make the buyer's inducement and receipt of a promotional allowance illegal in the absence of a showing of injury to competition when the only prohibition Congress directed to buyers allows the buyer this defense.

There is nothing incongruous about holding that the Commission must find injury to competition to enjoin the buyer when it need not so find to enjoin the seller. In

the later case it is enforcing a specific Congressional prohibition; whereas, in the instant case, the majority, in effect, is allowing the Commission to legislate under its general grant of authority in Section 5.

I would set aside the Commission's order.